Champaign Residential Services, Inc. *and* District 1199, the Health Care and Social Service Union, SEIU, AFL–CIO, Petitioner. Cases 9–RC–16853 and 9–RC–16856

April 30, 1998

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY MEMBERS FOX, LIEBMAN, AND BRAME

The National Labor Relations Board, by a three-member panel, has considered objections to an election held April 11, 1997 and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 59 for and 57 against the Petitioner, with 8 challenged ballots, a number sufficient to affect the results.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's findings[1] and recommendations,[2] and finds that a certification of representative should be issued.

1. The Employer excepts to the hearing officer's recommendation that Objections 1, 4, 6, and 7 be overruled, arguing that the hearing officer erred by failing to apply the standard for objectionable campaign propaganda enunciated in *Van Dorn Plastic Machinery Co. v. NLRB*, 736 F.2d 343 (6th Cir. 1984). We find that, even under the court's analysis in *Van Dorn*, the Petitioner's circulation of a flyer with 68 photocopied signatures of unit employees under a heading stating in part ''We are winning! Join Us!'' was not objectionable. Under *Van Dorn*'s interpretation of *Midland National Life Insurance Co.*, 263 NLRB 127 (1982), the document here does not constitute a forgery, as it was clear from the face of the flyer that it emanated from the Petitioner and, with one exception, the signatures on the flyer matched those submitted by employees on the Petitioner's ''Vote Yes!'' petitions. Further, we find no evidence that the flyer involved misrepresentations ''so pervasive and [ ] deception so artful that employees will be unable to separate truth from untruth . . . [so that] their right to a free and fair election would be affected.'' Id. at 345. In this regard, the record shows that misrepresentations in the gathering and compilation of the signatures were minimal. As the hearing officer found, all employees who signed the petition knew or should have known that their signatures indicated their support for the Union and all but two knew or should have known that their signatures would be shared with other voters. We conclude that such minor deviation from a perfect recording of employee sentiment does not constitute the type of deception which concerned the court in *Van Dorn*.

2. We adopt the hearing officer's recommendation to overrule the Employer's Objection 5, which involved two confrontations on the Employer's property of the Employer's managers by nonemployee union organizers and their supporters in the unit. In so doing, however, we find *Edward J. DeBartolo Corp.*, 313 NLRB 382 (1993), cited by the hearing officer, factually distinguishable from the present case. In *DeBartolo* the union representative did not enter the employer's premises, was not asked by the employer to leave, and the employer did not call the police to effectuate the union representative's removal. Hence, as the Board in *DeBartolo* noted, there was no issue in that case of the employer's loss of control over its premises. In contrast, the Petitioner's agents in the present case were on the Employer's property and were asked to leave.

We do, however, agree with the hearing officer that the circumstances here are closer to those in *Station Operators*, 307 NLRB 263 (1992), than to those in *Phillips Chrysler-Plymouth*, 304 NLRB 16 (1991), which the Employer argues is apposite. In *Phillips*, two union representatives ''repeatedly and belligerently'' refused to leave the employer's premises about 75 minutes before the election, after numerous requests and demands by the employer's president and the police that they do so. The Board stated that, ''[t]his direct challenge to the Employer's assertion of its property rights could not have been lost on the employees as they began to vote 75 minutes later.'' Id. In *Station Operators*, by contrast, the union's representatives' three confrontations with the employer occurred about 2 weeks before the election, lasted about 5 minutes each, and ended when the employer demanded that the representatives leave the premises.

[1] The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility findings unless a clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

[2] In adopting the recommendations that the Employer's Objections 1, 4, 6, and 7 be overruled, we do not rely on the hearing officer's use of a clipboard during the hearing with reference to the ''Vote Yes!'' petitions.

The Employer has excepted to the hearing officer's refusal to permit it to call rebuttal witnessess after both it and the Petitioner had rested their cases. We find no merit in this exception. Of the four witnesses the Employer sought to call, three—Jordan, Jackson, and McFarland—had already testified and been subject to cross-examination. We agree with the hearing officer that the Employer failed to demonstrate that recalling these witnesses would have accomplished more than revisiting issues concerning which they had already testified, which would have contributed little, if anything, to a complete factual record. With respect to Birch, while the Employer's efforts to subpoena her had been unsuccessful, the Employer had neither called her to testify nor informed the hearing officer that she had failed to respond to the subpoena, and had rested its case without indicating that it wished to call her as a witness. We agree with the hearing officer that the Employer failed to show that calling Birch would have accomplished anything more than ''rehashing'' matters already covered, and further, that the Employer was not prejudiced by her failure to testify.

Here, two confrontations occurred, the first on February 28, 1997, 6 weeks before the election, and the second on March 29, 1997, 12 days before the election. The first encounter involved an effort to persuade the Employer to recognize the Union voluntarily. Union Agent McFarland attempted to enter the Employer's management offices but was stopped by a manager in an incident lasting about 2 minutes. McFarland promptly returned to the reception area. The Employer asked the Union's representatives ''a couple of times'' within the space of about a minute to leave the building before they did so. McFarland reentered the building at the request of the employees, and left with the employees when the Employer called a male employee to escort her from the building.

The second incident involved 15—20 employees and two union representatives, Mott and McFarland. During a period of about 8 minutes, the group entered a hallway leading to the management offices, intending to confront the Employer with certain campaign materials, but were stopped by a manager. When the union representatives and employees asked to speak to the Employer's president, Johnson, they were told that he was not there. Before returning to the reception area, Mott tried to give the literature to the manager, who refused to take it. The literature dropped to the floor. The police arrived about 5 minutes after the group returned to the reception area, with Johnson arriving about 5 minutes later. Johnson engaged in conversations with both Mott and McFarland. He asked Mott to leave three times before asking the police to remove him, which they did, without resistance. McFarland spoke with Johnson for about 8 minutes. Johnson asked her to leave about twice, and she left promptly at the request of the police.

In the circumstances here, we agree with the hearing officer that the conduct of the Petitioner's agents did not rise to the level of objectionable conduct. In so concluding, we emphasize the distance in time the conduct occurred before the election, the lack of a flat refusal to leave the premises or any significant resistance by the Petitioner's representatives, and the relatively short intervals between the Employer's demands that the Petitioner's representatives leave and their departure. In light of these facts, we find the conduct here insufficient to warrant setting the election aside.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for District 1199, the Health Care and Social Service Union, SEIU, AFL–CIO, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time service and maintenance employees employed by the Employer in Champaign and Clark Counties, Ohio, including LPNs, relief staff, consumer assistants, rehabilitation aides, recreational therapists, dietary employees and cooks, but excluding all office employees, confidential employees, home supervisors, and all guards and supervisors as defined in the Act.